Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

LOS ANGELES POLICE DEPARTMENT, CITY OF LOS ANGELES, OFFICER JANE DOE RODRIGUEZ, SERGEANT JOHN DOE MONTELONGO, CHIEF WILLIE WILLIAMS,

Petitioners,

vs.

HARRY PERRY, and ROBERT "JINGLES" NEWMAN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the United States

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

SHOULD THE UNITED STATES SUPREME COURT STEP IN TO CLARIFY ONCE AND FOR ALL HOW MUNICIPALITIES WITH HIGH TRAFFIC PUBLIC FORUMS SHOULD REGULATE SALES BY UNLICENSED ROVING VENDORS (I.E., EXACTLY WHAT MAY AND MAY NOT BE BANNED AND WHAT MUST BE ALLOWED) IN LIGHT OF NINTH CIRCUIT COURT OF APPEAL DECISIONS WHICH CONFLICT EACH OTHER AND CONFLICT WITH REASONING SET FORTH BY THE UNITED STATES SUPREME COURT IN PREVIOUS OPINIONS TOUCHING ON THIS ISSUE?

II.

SHOULD THE CITY OF LOS ANGELES BE LEFT TO GUESS WHAT NINTH CIRCUIT RULINGS MEAN IN THE AREA OF CONFORMING PEDDLER STATUTES IN PUBLIC FORUMS TO CONSTITUTIONAL LAW, AFTER HAVING ALREADY AMENDED ITS STATUTE IN 1991 BASED ON THE NINTH CIRCUIT *GAUDIYA* DECISION AND NOW BEING TOLD THAT THE AMENDMENT WAS UNCONSTITUTIONAL BECAUSE WHAT *GAUDIYA* SAYS IS NOT REALLY WHAT *GAUDIYA* MEANS?

III.

DO EQUAL PROTECTION CONCERNS EXPRESSED BY THE NINTH CIRCUIT OUTWEIGH THE CONSTITUTIONAL RIGHT TO FREEDOM OF SPEECH OF NON-PROFIT ORGANIZATIONS, THEREBY MAKING THE CITY OF LOS ANGELES' STATUTE ALLOWING AN EXCEPTION TO ITS BAN ON ALL SALES ON VENICE BEACH FOR NON-PROFIT CORPORATIONS UNCONSTITUTIONAL ON ITS FACE?

IV.

MUST THE CITY OF LOS ANGELES, ABSENT A TOTAL BAN ON SALES, ACCORD SPECIAL FIRST AMENDMENT SPEECH PROTECTIONS TO ALL INDIVIDUALS ESPOUSING ANY RELIGIOUS, POLITICAL, PHILOSOPHICAL, IDEOLOGICAL, MUSICAL, HEALING, OR ARTISTIC BELIEF ON ITS VENICE BEACH BOARDWALK, THEREBY ALLOWING UNBRIDLED SOLICITATION OF DONATIONS AND SALES OF COMMERCIAL ITEMS ON THE VENICE BEACH BOARDWALK, REGARDLESS OF SUCH INDIVIDUAL'S LACK OF MEMBERSHIP IN ANY CHARITABLE OR NONPROFIT ORGANIZATION?

PARTIES TO THE PROCEEDINGS BELOW

In the trial court the plaintiffs were Harry Perry and Robert "Jingles" Newman, respondents in this Petition. The defendants included the Los Angeles Police Department, i.e., the City of Los Angeles, a municipal corporation, Police Officer Jane Doe Rodriguez, Sergeant John Doe (Frank) Montelongo, and Willie L. Williams in his official capacity as Chief of Police. In the Court of Appeals, Plaintiffs Harry Perry and Robert "Jingles" Newman were appellants and the Los Angeles Police Department, City of Los Angeles, Police Officer Jane Doe Rodriguez, Sergeant Frank Montelongo, and Willie L. Williams were appellees. After the appeal was taken to the Court of Appeals, Williams left the City of Los Angeles' employ and no longer has any official interest in this action.

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October Term, 1997

LOS ANGELES POLICE DEPARTMENT; CITY OF LOS ANGELES; OFFICER JANE DOE RODRIGUEZ,, SERGEANT JOHN DOE MONTELONGO, CHIEF WILLIE WILLIAMS,

Petitioners,

vs.

HARRY PERRY, and ROBERT "JINGLES" NEWMAN,

Respondents.

Petition for Writ of Certiorari
to the Supreme Court of the United States

Petitioners Los Angeles Police Department, City of Los Angeles, et. al. (hereinafter "City") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals, entered in the above entitled matter on August 25, 1997.

OPINIONS BELOW

The trial court rulings and judgment were not reported in any official or non-official reporter. The opinion of the Ninth Circuit Court of Appeals is reported at 121 F.3d 1365 and is reprinted in the Appendix hereto. The trial court's Judgment, Findings of Fact and Conclusions of Law, and Order Rejecting Plaintiffs' Objections to Proposed Findings are also reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 25, 1997. The City timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on October 22, 1997. The District Court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1343(a)(3), since this case involves substantial questions of First Amendment rights under federal law, as well as under 28 U.S. C. §§2201 and 2202 (relief sought includes a declaration of respective rights and obligations).

The District Court below having granted Defendant/Appellant City's Motion for Judgment after presentation of Plaintiffs/Appellees' case under Federal Rules of Civil Procedure Rule 5.2, with judgment entered on March 11, 1996, the Ninth Circuit Court of Appeals had jurisdiction on appeal from the entry of judgment pursuant to 28 U.S.C. §1291.

Upon appeal, the Ninth Circuit Court of Appeal reversed the judgment of the District Court, and found the City statute in question here governing peddling in the Venice

Beach area to be unconstitutional on its face. The City timely filed a Petition for Rehearing and/or Hearing En Banc, which was denied by the Ninth Circuit by order filed October 22, 1997. A subsequent request for Stay of Mandate Pending Petition for Certiorari to the U.S. Supreme Court was also denied by the Ninth Circuit by order of the court filed November 26, 1997. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any citizen of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Los Angeles Municipal Code Section 42.15, as amended in 1991, reads as follows:

> **SEC 42.15. PEDDLING, HAWKING AND SOLICITING ON BEACHES:** No person shall hawk, peddle or vend any goods, wares or merchandise, or beg or solicit alms or donations upon any public beach lands or beach properties adjoining the waterfront of the Pacific Ocean, or upon any boardwalk, sidewalk or public way immediately adjacent thereto between the southerly boundary of the City of Santa Monica and the northerly boundary of the City of El Segundo and between the northwesterly boundary of the City of Santa Monica and the northwesterly boundary of the City of Los Angeles.
>
> Nothing in this section contained shall be applicable to or prohibit the sale or offering for sale, or the possession, control or custody of newspapers, magazines, periodicals or other printed matter commonly sold or disposed of by newsboys or news vendors, nor shall the same be applicable to or prohibit persons engages in the selling or offering for sale or disposing of newspapers, magazines, periodicals or any other such printed matter from crying, call attention to, hawking, advertising or proclaiming the same.

This section shall not apply to the solicitation of donations by a non-profit organization or the sale of merchandise by a non-profit organization constituting, carrying or making a religious, political, philosophical or ideological message or statement relevant to the purpose of said non-profit organization. **(Added by Ord. No. 167,257, Eff. 9/9/91.)**

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. §§1331 and 1343(a)(3), since this case involves substantial questions of First Amendment rights under federal law, as well as under 28 U.S. C. §§2201 and 2202 , where the relief sought includes a declaration of the parties' respective rights and obligations. The essential contention of Plaintiffs/Appellees in this case is that Los Angeles Municipal Code (L.A.M.C.) Section 42.15, governing peddling of merchandise on Venice Beach, is unconstitutional because it contains exceptions for printed matter and for non-profit organizations.

Los Angeles Municipal Code Section 42.15[1] prohibits the sale of goods and solicitations of donations in a three mile narrow strip of beach front land in a section of Los Angeles

[1]All future code references are to the Los Angeles Municipal Code unless otherwise indicated.

known as Venice Beach, California. The specific strip of land is commonly called the "Venice Beach Boardwalk", and is a popular assembly place for citizens of Los Angeles and tourists, drawing sizable crowds on most weekends throughout the year. On the ocean side of the Venice Boardwalk gather artists, entertainers, political activists, musicians, fortune tellers, and religious and philosophical activists, who assemble on the ocean side on a daily basis. On the other side of the Boardwalk are tax-paying stores selling merchandise to tourists and others, restaurants, parking lots, and apartments. [Pretrial Conference Order Admitted Facts, Excerpts of Record p. 58, 60-61]. Section 42.15 then provides two exceptions to its ban on sales and solicitations: (1) for the sale of newspapers and other printed matter, and (2) for solicitation of donations or sale of merchandise by non-profit organizations constituting a religious, political, philosophical or ideological message relevant to the purpose of such non-profit organization. [Section 42.15, Appendix.]

Plaintiffs are both individuals engaged in expressive activities on the Venice Boardwalk: Newman represents an association known as "Animal Freedom Fighters", selling articles such as t-shirts, bumper stickers, buttons and books on the Boardwalk [Pretrial Conference Order, Admitted Facts I, J, K, and L, Excerpts of Record, p. 58-61], and Perry is a musician who performs his music on the Venice Boardwalk, soliciting donations for his performances and selling recordings of his religious music in form of compact discs and cassette tapes. [Pretrial Conference Order, Admitted Facts M and N, Excerpts of Record, p. 58-61]

After a bench trial before the District Court, Plaintiff/Respondents rested their case and Defendants/Petitioners made a Motion to Dismiss and enter judgement in their favor pursuant to Federal Rules of Civil Procedure, Rule 5.2. Citing *One World and One Family Now v. City and County of Honolulu,* 76 F.3d 1009, (9th Cir. 1996), as being substantially similar, the District Court granted the motion. The District Court subsequently signed Finding of Fact and Conclusions of Law [see Appendix] and entered Judgment in favor of Defendants/Appellants [see Appendix]. The District Court found the statute to be content neutral, and a reasonable time, place, and manner regulation of speech.

Plaintiffs/Appellees filed timely Notice of Appeal to the Ninth Circuit Court of Appeals, which reversed the ruling of the District Court. The Ninth Circuit found that the statute was content neutral and that the City did have significant state interests involved (protecting safety and convenience of persons using a public forum, promoting public safety and orderly movement of pedestrians, and protecting local merchant economy), but found that the statute was not narrowly tailored because "[t]here is no evidence that those without nonprofit status are any more cumbersome upon fair competition or free traffic flow than those with none profit status [and] [t]here is no justification for allowing those with membership in a nonprofit organization to sell items and solicit donations while disallowing those with no nonprofit membership from the same activities. The parties agreed, and the Ninth Circuit expressed its sympathy that the exception for nonprofit organizations was added to the statute based on the Ninth Circuit's ruling in *Gaudiya Vaishnava Soc. v. City of San Francisco*, 952 F.2d 1059 (9th Cir. 1990).[*Harry Perry*

v. Los Angeles Police Department, 121 F.2d 1365 (9th Cir. 1997), 1370.]

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI SHOULD BE GRANTED TO ASSIST NINTH CIRCUIT CITIES IN KNOWING WHAT LAW, IF ANY, OTHER THAN THE ABSOLUTE BAN APPROVED IN *ONE WORLD*, A CITY MAY ESTABLISH IN ORDER TO COMPLY WITH CONSTITUTIONAL FREEDOM OF SPEECH REQUIREMENTS AND ALLOW MAXIMUM FREEDOM OF SPEECH, WHILE STILL ADDRESSING IMPORTANT GOVERNMENTAL INTERESTS IN PROTECTING PUBLIC SAFETY AND LOCAL MERCHANT ECONOMY IN HIGH TRAFFIC/TOURIST PUBLIC FORUMS

Constitutional rights and regulation of charitable organization vendors seeking to share their message is an area in which all the major cities in the country, and particularly the warmer districts comprising the Ninth Circuit, have an interest, with each major city having its particular public forum area plagued by congestion, fraud, and sometimes violent crime due to unlicensed and unregulated free vendors. San Francisco has Fisherman's Wharf and Union Square

(*Gaudiya Vaishnava Soc. V. City of San Francisco,* 952 F.2d 1059 (9th Cir. 1990), Honolulu has certain areas of Waikiki (*One World v. City and County of Honolulu,* 76 F.3d 1009 (9th Cir. 1996), and Los Angeles has Venice Beach (*Harry Perry v. Los Angeles Police Dept.,* 121 F.3d 1365 (9th Cir. 1997), the case herein). This area of law has been visited on a number of occasions by the Ninth Circuit (see above), with each new visit creating additional questions (and problems) for municipalities attempting to reconcile Ninth Circuit opinions while regulating a high volume public forum, and attempting to protect public interests while maintaining the sanctity of the First Amendment right to freedom of speech.

When, as here, a major municipality such as the City of Los Angeles makes a distinct and major change to its peddling statute governing sales in an area as famous as Venice Beach based specifically on the language of a Ninth Circuit Court of Appeals opinion (*Gaudiya Vaishnava Soc. V. City of San Francisco,* 952 F.2d 1059 (9th Cir. 1990) (as read in conjunction with United States Supreme Court decisions) and then is told six years later by the Ninth Circuit that their own opinion does not really say what it clearly appears to say, intervention is surely necessary.

In 1991, the City of Los Angeles ("City") amended its Section 42.15 banning sales and solicitations on the Venice Beach Boardwalk (except for sales of newspaper and other such printed matter) by adding an exception for non-profit corporations. This amendment was made in light of the Ninth Circuit Court of Appeals holding in *Gaudiya, Id.*. Prior to *Gaudiya*, the City's statute was essentially a total ban on sales and solicitations on the Boardwalk.

In *Gaudiya*, the Ninth Circuit discussed in great detail the characteristics of charitable organizations for purposes of First Amendment rights:

> "The Supreme Court has held that fundraising for charitable organizations is fully protected speech. *Board of Trustees of the State University of New York v. Fox,* 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Additionally, it has held that an expressive item does not lose its constitutional protections because it is sold rather than given away. *City of Lakewood,* 108 S.Ct. At 2143 n.5; *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 647, 101 S.Ct. 2559, 2563, 69 L.Ed.2d 298 (1981); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 633, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980).....The street sale of merchandise such as a T-shirt and stuffed animals involves "commercial communication by the sales force." *See Project 80's, Inc. V. City of Pocatello,* 876 F.2d 711, 714 (9th Cir. 1988) (youth organization's door to door candy sales activities is commercial speech). As the district court found, however, [the nonprofit organizations here] sell their merchandise in conjunction with other activities in order to disseminate their organizations' message. The nonprofit groups inform individuals of their causes through distributing their literature, engaging in persuasive speech, and selling

> merchandise with messages affixed to the product. This "informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," is fully protected speech. *Schaumburg*, 444 U.S. at 633, 100 S.Ct. At 834. Where the pure speech and commercial speech by the nonprofits during these activities in inextricably intertwined, the entirety must be classified as noncommercial and we must apply the test for fully protected speech. *Riley*, 108 S.Ct. At 2677 (footnote omitted). *Gaudiya, supra*, at p. 1063-1064.

According to the Ninth Circuit in its opinion herein, however:

> ". . . . *Gaudiya* stands for the proposition that a government official cannot have unbridled discretion to decide who may engage in protected activities in a public forum. **While the *Gaudiya* plaintiffs were non-profits, none of the *Gaudiya* reasoning turned on this fact.** While we are sympathetic to defendants' attempt to alter its statute to comply with *Gaudiya*, we cannot rely on their good intentions to replace constitutional requirements." *Harry Perry v. Los Angeles Police Department*, 121 F.3d 1365, 1370, bold added.

In so ruling, the Ninth Circuit completely ignored its own final holding in its opinion in *Gaudiya*:

> "We hold that when **nonprofits** engage in activities where pure speech and commercial speech are inextricably intertwined the entirety must be classified as fully protected noncommercial speech. Accordingly, we modify the permanent injunction to prohibit the City from enforcing Section 660.2(j) of the San Francisco Police Code against **plaintiffs or any other nonprofit organization or person acting for it**, with respect to the sale of merchandise which is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message. *Id.*, at. p. 1066.

The City subsequently took the **exact** wording from the *Gaudiya* opinion and formulated the exception to its ban for nonprofits which is currently contained in Section 42.15. The Ninth Circuit herein completely denies that its *Gaudiya* decision turned on the nonprofit status of the *Gaudiya* plaintiffs at all, despite the fact that it made such a holding separating out and treating nonprofits organizations differently, and despite clear language indicating that the San Francisco statute **could not be enforced as to nonprofits only**, leaving the City of San Francisco free to enforce the statute against all others. How can the Ninth Circuit now say that the City of Los Angeles' statute codifying *Gaudiya* is unconstitutional on its face, and how is the City to reconcile the two cases without United States Supreme Court intervention? How can City of Los Angeles (and other cities)

know how to fashion a new statute, and how can any city be sure that the Ninth Circuit will not later deny its holding in this case as well?

When the Ninth Circuit stated in *Harry Perry* that:

> "there is no justification for allowing those with membership in a nonprofit organization to sell items and solicit donations, while disallowing those with no nonprofit membership from the same activities",

why did it not read the last two sentences of its own holding in *Gaudiya*, which does the exact same thing? Furthermore, if this is simply a misinterpretation by the City, it must be an easy one to make, since the Court in *Shadeen Al-Amin v. City of New York*, 979 F. Supp. 168 (1997) also noted that:

> "*Gaudiya* relied on case law that accords First Amendment protection to fund-raising for charitable organizations." *Id.*, at p. ____ (citations omitted).

II.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER THIS COURTS' HOLDINGS IN *FOX* AND *RILEY* THAT NON-PROFIT ORGANIZATION SOLICITATION IS FULLY PROTECTED SPEECH HAS ANY PRACTICAL APPLICATION IN LIGHT OF THE NINTH CIRCUIT RULING IN THIS CASE THAT ALL OTHERS MUST BE AFFORDED THE SAME STATUS AND TO AFFORD FUTURE LITIGATION ON THIS SAME ISSUE

United States Supreme Court decisions have held that non-profit organization solicitations, unlike other types of sales and solicitations, are fully protected speech (*Board of Trustees of the State Univ. of New York v. Fox* (1989), 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388; *Riley v. National Federation of the Blind* (1988), 487 U.S. 781, 101 L.Ed. 669, 108 S.Ct. 2667) Thus, speech by non-profit organizations is differentiated and given higher constitutional freedom of speech treatment than other types of speech. Furthermore, it is the City's position that when the United States Supreme Court, in *Riley v. National Federation of the Blind*, *Id.* at p. 795, noted that a state may constitutionally require non-profit fundraisers to disclose certain financial information to the state as a legitimate means of avoiding fraud, the court was legitimizing part of the reasoning behind the City requiring non-profit status in the statute in question here, which is to prevent fraud on tourists and residents alike from persons claiming to collecting money or selling items to benefit the poor or a nonexistent nonprofit group.

Under the Ninth Circuit decision herein, however, the City of Los Angeles may completely ban all persons, including charitable organizations, from soliciting or selling on the Boardwalk, but once the City decides to allow the Boardwalk forum to be open to charitable donations or the selling of expressive items, it may not require that such "vendors" have or obtain non-profit status before engaging in such activities on the Boardwalk. Instead, the City, if it wants to leave the forum open to charitable donations and solicitations, must enlist local police officers as constitutional law experts, attempting to determining whether a myriad of transient artists, tarot card readers, rice grain writers, healers, musicians, are charitable, whether they have a message, and what that message is. The City's other option, outside of an involved permit scheme, is to go back to a total ban of sales and solicitations on the Boardwalk (as in *One World One Family Now,* 76 F.3d 1009 (9th Cir. 1996), which would no doubt land the City right back here in a year or so in a new suit with the same plaintiffs who would again be barred from their activities on the Boardwalk.

What practical use do the United States Supreme Court rulings finding greater constitutional protection for nonprofit organizations have if it is patently unconstitutional to afford nonprofit organizations any different treatment than any other person or entity? Why make a distinction capable of application only within the confines of an appellate court opinion when a mystery shrouds its usefulness in the light of day to day life? This issue is of importance to dozens and dozens of cities dealing with the proliferation of entrepreneurs seeking to sell their wares without overhead, tax consequences, or tracing by dissatisfied or disgruntled or

defrauded customers. United States Supreme Court intervention is the only forum left to assist the City.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE ONLY WAY TO RECONCILE THE NINTH CIRCUIT HOLDINGS IN *GAUDIYA* AND *ONE WORLD* IS TO REVERSE THE NINTH CIRCUIT IN THE INSTANT CASE

In *Gaudiya*, *supra*, (9th Cir. 1990), the plaintiffs, non-profit corporations, challenged the constitutionality of a San Francisco ordinance which prohibited non-profit organizations from selling in the Fisherman's Wharf or Union Square area of San Francisco without a commercial peddler's permit any merchandise other than books, pamphlets, buttons, bumper stickers, posters, or items that have no intrinsic value other than to communicate a message. As previously noted, the *Gaudiya* court held that when nonprofit organizations engage in activities where pure speech and commercial speech are inextricably intertwined, the entirety of the actus must be classified as fully protected noncommercial speech. However, the case of *One World One Family Now*, *supra*, (9th Cir. 1996) further addressed the issue of whether an ordinance prohibiting the sale of merchandise on city streets may be constitutionally applied to bar non-profit organizations from selling message bearing items (t-shirts). In *One World*, plaintiff non-profit organizations, along with a number of commercial t-shirt vendors, set up display tables on the sidewalks of Kalakaua Avenue, one of the busiest commercial streets in Waikiki. The City of Honolulu notified the sidewalk vendors, including the plaintiffs, that they were

in violation of a Honolulu statute prohibiting the sale of all

> "goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services . . . . . upon the public streets, alleys, sidewalks, malls, parks, beaches and other public places in Waikiki".

The *One World* plaintiffs then sued, as did plaintiffs herein, for declaratory and injunctive relief claiming violation of their First Amendment rights.

The *One World* court found that the city was validly regulating the time, place and manner of speech pursuant to legitimate and significant interests, and held that while plaintiffs' acts were protected, the ordinance in question was content-neutral, narrowly tailored, and left ample alternative channels of communications. The court noted that the provisions of the Honolulu statute provided several exemptions: sale of newspapers and sale of buttons and souvenir items sold in conjunction with a parade. The court found, however, that because these exemptions did not enable the city to discriminate against ideas it disfavored, the exemptions did not render the ordinance content-based or invalid. *Id.*, at. P. 1012, n. 5.

The *One World* and *Gaudiya* holdings, taken together, more than support the constitutionally of the statute involved in this case. Additionally, there are ample channels of alternative communication open and available to plaintiffs including "orally propagating" their views on the Boardwalk and in other areas, distributing free literature espousing their views, handing out free t-shirts to passers-by or mingling with

tourists throngs wearing t-shirts, or selling t-shirts or other message bearing matter through local retail outlets or by opening their own stores. *Michael Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655, 101 S.Ct. 2 559, 69 L.Ed.2d 298 (1981); *Acorn v. City of Phoenix, supra,* 798 F.2d. 1260, 1268, 1271 (9th Cir. 1986); *National Anti-Drug Coalition v. Bolger,* 737 F.2d 717, 726-727 (9th Cir. 1984); *One World One Family Now v. City and County of Honolulu, supra,* 76 F.3d 1009, 1014. The Ninth Circuit's tangentially ruling in this case simply muddies the waters of an already murky lake.

CONCLUSION

Even a ruling by this Court against Petitioners would be invaluable for the City to demystify the proper path to take at this stage, and to prevent relitigation of these same issues in the next go round. For this reason, for the reasons set forth above, and to avoid future litigation, Petitioners respectfully request that this court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action.

The fact is that:

> ". . . The cases protecting the right to solicit contributions in a public forum do so not because the First Amendment contemplates the right to raise money, but rather because the acto of solicitation contains a communicative element." (citations omitted) *Friends of the*

Vietnam Veterans Memorial v. Roger G. Kennedy. 116 F.3d 495, 497; 325 U.S. App. D.C.

Accordingly, the Plaintiffs/Respondents herein, who have made no showing of nonprofit status, should not be allowed to effective force the City to chose between chaos and silencing nonprofit organizations.

DATED: January 20, 1997

Respectfully submitted,

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APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRY NMI PERRY; ROBERT NEWMAN, aka: "JINGLES",
Plaintiffs-Appellants,

v.

LOS ANGELES POLICE DEPARTMENT; CITY OF LOS ANGELES; JANE DOE RODRIGUEZ, Police Officer; FRANK MONTELONGO; WILLIE L. WILLIAMS, Chief of Police,
Defendants-Appellees.

No. 96-55545
D.C. No. CV-95-03028-LEW
OPINION

Appeal from the United States District Court
for the Central District of California
Laughlin E. Waters, District Judge, Presiding

Argued and Submitted
August 4, 1997—Pasadena, California

Filed August 25, 1997

Before: Cynthia Holcomb Hall and Thomas G. Nelson, Circuit Judges and B. Lynn Winmill, District Judge.*

Opinion by Judge Hall

*The Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

SUMMARY

Individual Rights/Freedom of Speech

The court of appeals reversed a judgment of the district court. The court held that a municipal ordinance violates the First Amendment by limiting a ban on sales and solicitations in connection with protected expressive activity to persons lacking nonprofit status.

In an effort to conform to a Supreme Court decision, appellee City of Los Angeles passed an ordinance banning the sale of goods or soliciting donations in an area adjoining the Pacific Ocean, including the Venice Beach Boardwalk. There were two exceptions to the prohibition: the sale of printed matter usually sold by news vendors, and solicitation of donations and the sale of merchandise by a nonprofit organization if it bore a religious, philosophical, or ideological message or statement relevant to the purpose of the organization.

Appellant Harry Perry is a musician and performance artist who solicits donations and sells recordings of his music. His music has a religious content. Appellant Robert Newman solicits donations and sells goods bearing messages and slogans on behalf of an unincorporated animal-rights group.

Perry and Newman received citations from appellee Los Angeles Police Department for violating the ordinance. Police officers told them that they would have to provide documentation of nonprofit status to continue their activities.

Perry and Newman brought a federal action against the City and the Department, alleging that the ordinance infringed their First Amendment rights in violation of the Equal Protection Clause. They challenged the ordinance as facially unconstitutional, vague, and overbroad in that it prohibited political, religious, and other expressive activities protected by the First Amendment.

The district court issued a temporary restraining order prohibiting enforcement of the ordinance against persons engaged in expressive activity. Following a bench trial, the court found that the plaintiffs sold wares that were inextricably intertwined with the messages they contained; the ordinance prohibited the sale of the expressive matter; the City had a substantial interest in protecting local merchants from unfair competition from street vendors; and the City had a like interest in limiting the number of sellers on the Boardwalk to ensure the free flow of traffic.

The district court concluded that the wares were fully protected by the First Amendment; the ordinance was not content-based; and the ordinance was a reasonable time, place, and manner restriction. The court entered judgment for the defendants. Perry and Newman appealed.

[1] In First Amendment overbreadth cases, courts allow litigants to challenge a statute by showing that it substantially abridges the First Amendment rights of parties not before the court. Because the plaintiffs' claims were rooted in the First Amendment, they could argue the impact of the ordinance on their own expressive activities, as well as the expressive activities of others. The plaintiffs could bring a facial challenge to the ordinance.

[2] There was no dispute that the activities took place in a public forum. [3] The items sold included music, buttons, and bumper stickers bearing political, religious, and ideological messages. They were expressive items, and did not lose their constitutional protection simply because they were sold. [4] When the commercial and expressive parts of speech are inextricably intertwined, a court cannot parcel out the protected and unprotected parts. [5] The plaintiffs' expressive activities were fully protected by the First Amendment.

[6] When a government allows some forms of protected speech, the Equal Protection Clause is implicated, and the

government must show that the distinctions are finely tailored to serve substantial state interests. [7] In a traditional public forum, time, place, and manner restrictions on protected speech are acceptable only if they are content-neutral, serve a significant state interest in a narrowly tailored fashion, and leave open ample alternative communication channels.

[8] A regulation is content-neutral if it is justified without reference to the content of the regulated speech. The restriction in this case referred to the content of speech: it permitted nonprofit organizations to sell items "constituting, carrying, or making a religious, political, philosophical, or ideological message or statement *relevant to the purposes of said nonprofit organization.*" A police officer enforcing the restriction would have to look to the content of a nonprofit organization's sales to determine whether it was relevant to the organization's purpose. [9] However, the actual ban on sales and solicitations made no reference to content. There was no evidence that the government adopted the restriction because of disagreement with the message conveyed. It was possible to proceed under the assumption made by the district court that the ordinance was content-neutral.

[10] A government interest in protecting the safety and convenience of persons using a public forum is a valid objective. Government interests in promoting public safety and the orderly movement of pedestrians, and in protecting the local merchant economy are also substantial. The interests articulated by the City were significant state interests.

[11] Even when the government's interests are substantial, the means chosen to effectuate them must be narrowly tailored. In the area of free expression, broad prophylactic rules are suspect. Precision of regulation must be the touchstone. A government must serve its legitimate interests by narrowly drawn regulations designed to serve them without unnecessarily interfering with First Amendment freedoms.

[12] There was no justification for eliminating only individuals with no nonprofit affiliation. There was no evidence that those without nonprofit status were any more cumbersome on fair competition or free traffic flow than those with it. There was no justification for allowing those with membership in a nonprofit organization to sell items and solicit donations, while disallowing those with no nonprofit membership from the same activities. The regulation was not narrowly tailored.

[13] The defendants' argument implied that the plaintiffs' expressive activities should be accorded less protection than they would if those same activities were conducted by nonprofit organizations. This type of speaker-based discrimination is unacceptable. [14] There is no authority limiting the right to seek charitable donations or to sell expressive items to those with membership in nonprofit organizations. Once it was decided that the activity in this case was expressive and fully protected by the First Amendment, the fact that the plaintiffs were not nonprofit organizations did not affect the level of protection accorded to their speech.

[15] The nonprofit distinction restricted a substantial quantity of speech—expressive speech by people who are not nonprofit members—that does not create the same evils as purely commercial activity on the Boardwalk, which is what the government admittedly wanted to restrict. [16] A reasonable time, place, and manner restriction need not be the least restrictive alternative available, as long as the means chosen are not substantially broader than necessary to achieve the government's interest. As it stood, the ordinance was not sufficiently tailored to the government interest it purported to advance. It was therefore constitutionally deficient on its face.

COUNSEL

James H. Fosbinder and Rhonda M. Fosbinder, Fosbinder & Fosbinder, Venice, California, for the plaintiffs-appellants.

Vivienne A. Swanigan, Deputy City Attorney, Los Angeles, California, for the defendants-appellees.

OPINION

HALL, Circuit Judge:

Plaintiffs appeal from the district court's judgment for defendants as a matter of law following the presentation of plaintiffs' evidence in a bench trial. This court has jurisdiction pursuant to 28 U.S.C. § 1291. We find Los Angeles Municipal Code § 42.15 facially unconstitutional and REVERSE the judgment of the district court.

I. Facts

Plaintiff Perry is a musician and performance artist who solicits donations for his performances and sells recordings of his music. He is a member of the Sikh religion, and his musical lyrics include excerpts from the Holy Book of his religion and imply religious content.

Plaintiff Newman is an activist who, on behalf of the "Animal Freedom Fighters," an unincorporated group of individuals, solicits donations and distributes messages regarding animals' rights through the sale of literature, books, t-shirts, bumper stickers, buttons, and other articles bearing political slogans, such as "Meat is Murder."

Defendants are the Los Angeles Police Department ("LAPD"), the City of Los Angeles ("the City"), and officers of the LAPD responsible for enforcing Los Angeles Municipal Code § 42.15, which plaintiffs contend is unconstitutional.

Section 42.15 provides, "No person shall hawk, peddle or vend any goods, wares or merchandise, or beg or solicit alms

or donations upon" any sidewalk, boardwalk, or public way adjoining a specified length of the Pacific Ocean, including the area known as the Venice Beach Boardwalk ("Boardwalk").

There are two exceptions to this prohibition. One is for the sale of newspapers, magazines, periodicals "or other printed matter commonly sold or disposed of by newsboys or news vendors." The second is for "the solicitation of donations by a non-profit organization [and] the sale of merchandise by a non-profit organization constituting, carrying or making a religious, philosophical or ideological message or statement relevant to the purpose of said non-profit organization." The exception for non-profit organizations was added in 1991 in response to this circuit's decision in *Gaudiya Vaishnava Soc. v. City of San Francisco*, 952 F.2d 1059 (9th Cir. 1990).

In 1995, both plaintiffs were told by members of the LAPD that they must provide documentation of nonprofit status to continue their activities. Each was given a citation for violation of § 42.15.

The plaintiffs claim that § 42.15 infringes on fundamental First Amendment rights, in violation of the Equal Protection Clause. They challenge section 42.15 as facially unconstitutional, vague and overbroad in that it prohibits political, religious, and other expressive activities.

The district court granted a temporary restraining order on May 8, 1995, enjoining enforcement of the ordinance against individuals who were engaged in expressive activity, while allowing enforcement of the ordinance against vendors engaged in purely commercial sales, such as food.

At a bench trial, plaintiffs presented witnesses Perry and Newman, who testified to the types of goods they sold and the activities for which they solicited donations. At the close of

plaintiffs' case, the defendants moved for judgment on partial findings pursuant to Fed.R.Civ.P. 52(c).

The district court granted defendants' motion, adopting the findings of fact and conclusions of law prepared by defendants. In doing so, the court found the following facts: plaintiffs sell wares that are inextricably intertwined with the political, religious, sociological, and ideological messages they contain; the ordinance prohibits the sales of plaintiffs' expressive works; the City has a substantial interest in protecting local merchants from unfair competition and in attracting and preserving business; the City also has a substantial interest in limiting the number of sellers along the Boardwalk to insure the free flow of traffic. The district court concluded that, as a matter of law, the wares plaintiffs sell are fully protected by the First Amendment; section 42.15 is not content based; and section 42.15 is a reasonable time, place and manner restriction on the fully protected speech, citing *One World One Family v. City and County of Honolulu*, 76 F.3d 1009 (9th Cir. 1996). Accordingly, it entered judgment for defendants.

Plaintiffs objected to these findings of facts and law, and the district court rejected those objections. Plaintiffs appeal.

II. Standard of Review

This court reviews a judgment as a matter of law de novo. *Pierce v. Multnomah County*, 76 F.3d 1032, 1037 (9th Cir. 1996). Constitutional issues are reviewed de novo. *United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996). A district court's determinations on questions of law and on mixed questions of law and fact that implicate constitutional rights are reviewed de novo. *Arab-American Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1066 (9th Cir. 1995).

III. Analysis

A. Facial Challenge

[1] In First Amendment overbreadth cases, courts allow litigants to "challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980). This is because of "the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute." *Id.* Because plaintiffs' claims are rooted in the First Amendment, they may argue the impact of the ordinance on their own expressive activities, as well as the expressive activities of others. *Schad v. City of Mount Ephraim*, 452 U.S. 61, 66 (1981). Thus, plaintiffs may bring a facial challenge to this ordinance.

B. Fully Protected Speech

We must first decide whether the activities involved here are accorded full protection under the First Amendment.

[2] There is no dispute that these activities take place in a public forum—a place that has "immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939). The Supreme Court has repeatedly recognized public streets as "the archetype of a public forum." *Frisby v. Schultz*, 487 U.S. 474 (1988).

[3] The items sold here include music, buttons, and bumper stickers bearing political, religious, and ideological messages. These are expressive items, and they do not lose their constitutional protection simply because they are sold rather than given away. *Heffron v. International Society for Krishna Con-*

sciousness, 452 U.S. 640, 647 (1981); *see also Schaumberg*, 444 U.S. at 633; *Gaudiya*, 952 F.2d at 1064-65.

[4] In *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), the Supreme Court found that where the commercial and expressive parts of speech are "inextricably intertwined," a court could not parcel out the protected and unprotected parts of the speech. This court has applied the "inextricably intertwined" standard to merchandise like that at issue here: the *Gaudiya* court found that the plaintiffs' street sale of merchandise with messages affixed to the products was fully protected because the commercial and noncommercial aspects of speech "inextricably intertwined." *Gaudiya*, 952 F.2d at 1064-65; *see also One World*, 76 F.3d at 1012 (finding sale of merchandise bearing political, religious, philosophical or ideological messages "inextricably intertwined" with other forms of protected expression).

[5] Plaintiffs' expressive activities are of the same type found to be fully protected in *Gaudiya* and in *One World* and are fully protected by the First Amendment.

C. Government Restriction on Speech

[6] Because the First Amendment fully protects the activities at issue here, the question is whether the government has placed a legitimate restriction on these activities. The government restriction banning sales and solicitations of donations contains an exception for non-profits. When a government allows some forms of protected speech but prohibits other forms of protected speech, the Equal Protection Clause is implicated, and the government must show that the distinctions are "finely tailored to serve substantial state interests." *Carey v. Brown*, 447 U.S. 456, 461-62 (1980).

[7] In a traditional public forum, time, place, and manner restrictions on protected speech are acceptable only if they are content neutral, "serve a significant state interest in a nar-

rowly tailored fashion," and "leave open ample alternative communication channels." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). We examine each requirement in turn.

1. Content Neutral

[8] A regulation is content neutral if it is "justified without reference to the content of the regulated speech." *Clark*, 468 U.S. at 293. The restriction here does refer to the content of speech; it permits non-profit organizations to sell items "constituting, carrying or making a religious, political, philosophical or ideological message or statement *relevant to the purpose of said non-profit organization*." A police officer enforcing this restriction would have to look to the content of a non-profit organization's sales to determine whether it was relevant to the organization's purpose. Appellants argue that this part of the exception makes the ordinance content based.

[9] However, the actual ban on sales and solicitation of donations makes no reference to content. The exception for non-profits, which is arguably content-based, was added in 1991 in an effort to bring the statute in compliance with this court's decision in *Gaudiya*. There is no evidence that the government adopted the restriction "because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Thus, we will proceed under the assumption made by the district court that the ordinance is content neutral.

2. Significant State Interest

The government asserts a state interest in protecting local merchants from unfair competition and in ensuring the free flow of traffic along the Boardwalk.

[10] A government interest in protecting the safety and convenience of persons using a public forum is a valid gov-

ernment objective. *See Heffron*, 452 U.S. at 650. Government interests in promoting public safety and the orderly movement of pedestrians, and in protecting the local merchant economy are also substantial. *One World*, 76 F.3d at 1013. Thus, the interests articulated by the City here are significant state interests.

3. Narrowly Tailored

Next, the court must examine whether the ordinance is narrowly tailored to serve the interests of protecting local merchants and aiding free traffic flow. This is where the defendants' argument fails.

[11] Even when the government's interests are substantial, the means chosen to effectuate them must be narrowly tailored. In the area of free expression, "[b]road prophylactic rules . . . are suspect. Precision of regulation must be the touchstone . . ." *Schaumberg*, 444 U.S. at 637 (citations omitted). A government may serve its legitimate interests, but "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Id.* (citations omitted). The ordinance here falls short of meeting this standard.

In *Carey v. Brown*, the Court invalidated an ordinance that prohibited picketing in residential areas, where the ordinance excepted picketing regarding labor issues. 447 U.S. 455 (1980). While the Court acknowledged the State's substantial interest in protecting residential privacy, there was "nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern." *Id.* at 466. Even though the ordinance served the government interest by reducing the total number of picketers, the distinction used to effectuate the reduction was not narrowly tailored to the government interest.

In *City of Cincinnati v. Discovery Network*, the Supreme Court invalidated an ordinance that permitted newsracks on public streets for newspapers, but did not permit them for commercial handbills. 507 U.S. 410 (1993). The Court accepted the government's legitimate interest in safety and esthetics on city streets, and the proposition that less newsracks would aid that interest. However, the Court found no basis for distinguishing between the newsracks containing newspapers and those containing commercial handbills. It found that the newsracks containing commercial handbills "are no more harmful than the permitted newsracks." *Id.* at 418. This was an "insufficient justification for the discrimination" against the commercial use of newsracks. *Id.* Because each type of paper contributed equally to the safety and esthetic concerns generated by newsracks on public streets, the ordinance was not sufficiently tailored to the city's significant interests.

In *Schaumberg*, the Supreme Court invalidated an ordinance prohibiting door-to-door solicitations by charitable organizations unless the organization used at least 75% of its receipts for charitable purposes. The Court found that the justifications given by the government for limiting the total number of door-to-door solicitations were valid, but that the distinction between the groups who could solicit and those who could not solicit was not sufficiently tailored to serve those purposes. The Court found that the ordinance advanced the significant government purpose of protecting residential privacy because it reduced the total number of door-to-door solicitations. However, the means chosen to effectuate this reduction were not narrowly tailored to the articulated interest, absent a showing that groups giving less than 75% of their money to charitable purposes were any more of an intrusion than those giving more than 75% of their money. The Court further noted that genuine concerns about preventing fraud and harassment were already sufficiently covered by other statutes.

[12] Here, we are faced with the same issue as that in *Carey*, *Discovery Network*, and *Schaumberg*—whether the means the government uses to discriminate are narrowly tailored to fit its interests. The City has a legitimate interest in protecting merchants from unfair competition and n aiding the free flow of traffic. A decrease in the total number of vendors on the Boardwalk would aid that interest. However, there is no justification for eliminating only those individuals with no nonprofit affiliation. There is no evidence that those without nonprofit status are any more cumbersome upon fair competition or free traffic flow than those with nonprofit status. There is no justification for allowing those with membership in a nonprofit organization to sell items and solicit donations, while disallowing those with no nonprofit membership from the same activities. The regulation, like those in *Schaumberg*, *Carey*, and *Discovery Network*, is not narrowly tailored enough to pass muster.

Defendants attempt to explain their discriminatior based on nonprofit status. The non-profit requirement, they claim, provides a simple method of determining whether or not a person is engaged in commercial activity, and of determining the goals or message of the solicitor or seller. This argument fails because plaintiffs' activities here are not purely commercial, but rather "inextricably intertwined" with expressive activities; as such, they are fully protected First Amendment activities. Plaintiffs here do not have non-profit status; thus, a lack of non-profit status cannot reasonably be a predictor of purely commercial activity.[1]

Defendants also point to the fact that the *Gaudiya* plaintiffs

[1]Defendants also argued to the district court that plaintiff Newman could easily obtain nonprofit status and thus continue his activities along the Boardwalk, again admitting that there is no substantive difference between Newman's activities and those of non-profits. This argument contradicts the argument they now make that there is a nexus between people with no nonprofit affiliation and unprotected commercial activities.

were non-profit. However, *Gaudiya* stands for the proposition that a government official cannot have unbridled discretion to decide who may engage in protected activities in a public forum. While the *Gaudiya* plaintiffs were non-profits, none of the *Gaudiya* reasoning turned on this fact. While we are sympathetic to defendants' attempt to alter its statute to comply with *Gaudiya*, we cannot rely on their good intentions to replace constitutional requirements.

[13] Defendants' argument implies that plaintiffs' expressive activities should be accorded less protection than they would if those same activities were conducted by non-profit organizations. This type of speaker-based discrimination is unacceptable. In *Schaumberg*, the Court found that the solicitation of charitable donations could not be regulated by a distinction based on *who* was doing the soliciting. The Court has also noted that "government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510, 2516 (1995). The government's argument that prohibition of expressive speech can turn on a person's membership in a non-profit organization fails.

[14] There is simply no authority limiting the right to seek charitable donations or to sell expressive items to those with memberships in non-profit organizations. No other First Amendment rights are restricted in such a manner. Once it is decided that the activity here is expressive activity, fully protected by the First Amendment, the fact that plaintiffs are not nonprofit organizations does not affect the level of protection accorded to their speech.

[15] The district court relied on *One World* to find the ordinance here a valid time, place or manner restriction. Accordingly, appellees rely primarily on *One World* to support their case. However, in *One World*, the restriction did not discriminate against certain types of speech depending on the speaker. In fact, in *One World*, when the court analyzed whether the

ordinance was narrowly tailored, it reasoned that the ordinance was narrowly tailored because it addressed the government interests "without . . . significantly restricting a substantial quantity of speech that does not create the same evils." 76 F.3d at 1014 (citing *Ward*, 491 U.S. at 799 n.7). Here, defendants claim to be prohibiting the evil of commercial activity by prohibiting all soliciting of donations and sales by anyone not affiliated with a nonprofit. However, the nonprofit distinction significantly restricts a substantial quantity of speech—namely expressive speech by people who are not nonprofit members—that does not create the same evils as purely commercial activity on the Boardwalk—which is what the government admittedly wants to restrict. Thus, applying the reasoning of *One World*, rather than merely looking to its result, one can see that the ordinance at issue here is not narrowly tailored to serve government interests.

Appellees also point to *City of New Orleans v. Dukes*, which upheld an ordinance distinguishing between food vendors. However, this case is inapposite. 427 U.S. 297 (1976). The Court applied the rational basis test, as there were no First Amendment rights implicated in the selling of food. As such, the distinction was upheld because it was not "wholly arbitrary." *Id.* at 304. Here, the ordinance prohibits plaintiffs from participating in constitutionally protected expressive speech. Thus, the rational basis test applied in *Dukes* does not apply.

[16] A reasonable time, place and manner restriction need not be the least restrictive alternative available. "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800. The ordinance, as it stands, is not sufficiently tailored to the government interest it purports to advance. Therefore, it is constitutionally deficient on its face.

IV. Conclusion

The statute at issue here is overbroad. Given the significant state interests of the City, the statute is overly inclusive

because it prohibits not only purely commercial activities, but also protected expressive activities, like those of plaintiffs here. Because the distinction between expressive activities by members of nonprofit organizations and expressive activities by others is not narrowly tailored to advance the government's interests, the statute is unconstitutional on its face.

Because the distinctions made in the ordinance implicate fundamental First Amendment rights, and they are not narrowly tailored to the City's significant government interests, we REVERSE.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 22 1997
Cathy A. Catterson,Clerk
U.S. Court of Appeals

HARRY NMI PERRY; ROBERT NEWMAN, aka "JINGLES",	)	No. 96-55545
Plaintiffs-Appellants,	)	D.C. No. CV-95-03028-LEW
v.	)	
	)	ORDER
LOS ANGELES POLICE DEPARTMENT; CITY OF LOS ANGELES; JANE DOE RODRIGUEZ, Police Officer; FRANK MONTELONGO; WILLIE L. WILLIAMS, Chief of Police,	)	
Defendants-Appellees.	)	

Before: HALL and T.G. NELSON, Circuit Judges, and WINMILL*, District Judge.

The panel has voted to deny appellants' petition for
The panel has voted to deny appellants' petition for rehearing

*The Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

rehearing. Judge Nelson has voted to reject the suggestion for rehearing en banc and Judges Hall and Winmill have recommended rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing enbanc is REJECTED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
NOV 26 1997
Cathy A. Catterson,Clerk
U.S. Court of Appeals

HARRY NMI PERRY; ROBERT NEWMAN, aka "JINGLES",	)	No. 96-55545
Plaintiffs-Appellants,	)	D.C. No. CV-95-03028-LEW
v.	)	
	)	ORDER
LOS ANGELES POLICE DEPARTMENT; CITY OF LOS ANGELES; JANE DOE RODRIGUEZ, Police Officer; FRANK MONTELONGO; WILLIE L. WILLIAMS, Chief of Police,	)	
Defendants-Appellees.	)	

Before: HALL, Circuit Judge.

Appellee's motion for stay of mandate pending petition to the United States Supreme Court for a writ of certiorari is DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
MAR 11 1996
Central District of California
By Deputy

HARRY PERRY and ROBERT "JINGLES" NEWMAN, Plaintiffs, v. LOS ANGELES POLICE DEPARTMENT; CITY OF LOS ANGELES; OFFICER JANE DOE RODRIGUEZ, SERGEANT JOHN DOE MONTELONGO, CAPTAIN WILLY. WILLIAMS, and DOES and 1-10, inclusive, Defendants.	CASE NO. CV-95-3028 LEW (RMx) JUDGMENT [F.R.C.P. Rule 52] [Local Rule 14.4]

This matter came on regularly before this Court on February 20, 1996 for trial without a jury. James K. Hahn, City Attorney for the City of Los Angeles, by Byron R. Boeckman, Assistant City Attorney, appeared as attorney for defendants City of Los Angeles, Frank Montelongo, sued herein as John Doe Montelongo, and Chief of Police Willie L. Williams. James H. Fosbinder and Rhonda Fosbinder appeared as attorneys for plaintiffs Harry Perry and Robert "Jingles" Newman.

Plaintiffs having presented their case to the Court, the Court having heard all of the evidence having been presented by plaintiffs at the time of trial and all pleadings and papers on file in this case having been read and examined by the Court, defendants having made a motion to dismiss pursuant to Federal Rules of Civil Procedure, Rule 5.2, arguments having been presented, and the Court having made findings of fact and conclusions of law, which have been signed and filed,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. This action is dismissed; and

2. Each party is to bear its own costs in this action.

DATED: MAR 96

LAUGHLIN E. WATERS
LAUGHLIN E. WATERS
UNITED STATES
DISTRICT COURT
JUDGE

Submitted by
/s/
BYRON R. BOECKMAN
Assistant City Attorney

Attorneys for Defendants,
CITY OF LOS ANGELES, FRANK
MONTELONGO and WILLIE L. WILLIAMS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HARRY PERRY and ROBERT "JINGLES" NEWMAN, Plaintiffs, v. LOS ANGELES POLICE DEPARTMENT; CITY OF LOS ANGELES; OFFICER JANE DOE RODRIGUEZ, SERGEANT JOHN DOE MONTELONGO, CAPTAIN WILLY. WILLIAMS, and DOES and 1-10, inclusive, Defendants.	CASE NO. CV-95-3028 LEW (RMx) FINDINGS OF FACT AND CONCLUSIONS OF LAW [F.R.C.P. Rule 52] [Local Rule 14.3]

Defendants City of Los Angeles, Frank Montelongo and Willie L. Williams propose the following Findings of Fact and Conclusions of Law, pursuant to Local Rule 14.3.

FINDINGS OF FACT

1. The City of Los Angeles is a municipal corporation chartered under the laws of the State of California.

2. Willie L. Williams is the Chief of Police of the City of Los Angeles, responsible for the operations of that Department.

3. Frank Montelongo is a sergeant of police employed by the Los Angeles Police Department and during

the Spring and Summer of 1995 was assigned to the Venice Area Police Station as a supervisor in the Beach Detail. The Beach Detail was responsible for enforcing all state and local laws at Venice Beach Boardwalk.

4. Officer Jane Doe Rodriguez is a police officer employed by the Los Angeles Police Department and assigned to the Venice Area Beach Detail. Sergeant Frank Montelongo was her immediate supervisor.

5. Venice Beach Boardwalk is a paved sidewalk extending approximately three miles along and adjacent to the Pacific Ocean on public beach lands and properties within the City of Los Angeles.

6. Plaintiff Harry Perry is a roller-skating musician and performance artiest who sells his recorded music in the form of compact discs and cassette tapes. Plaintiff Perry earns his living by selling these discs and tapes to passersby on the Venice Beach Boardwalk.

7. Plaintiff Robert Newman is an animal rights activist who, on behalf of an organization called Animal Freedom Fighters, solicits donations and distributes his message through the sale of literature, books, T-shirts, bumper stickers, buttons and other articles hearing [sic] such messages as "Meat is Murder". Plaintiff Newman maintains a table on the Venice Beach Boardwalk from which he and other members of his organization sell their wares.

8. The wares which the plaintiffs seek to sell are inextricably intertwined with the political, religious, philosophical and ideological messages contained therein.

9. Los Angeles Municipal Code Section 42.15 provides, in relevant part, that

> "[n]o person shall hawk, peddle or vend any goods, wares or merchandise, or beg or solicit alms or donations upon any public beach lands or beach properties adjoining t he

waterfront of the Pacific Ocean, or upon any boardwalk, sidewalk or public way immediately adjacent thereto. . ."

The ordinance exempts from its prohibition (1) "newspapers" or other related matter sold by news vendors and (2) solicitations of donations or sales of speech related matter by non-profit organizations.

10. Neither of the plaintiffs are members of or acting on behalf of "non-profit" organizations as that term is used in Los Angeles Municipal Code Section 42.15.

11. Enforcement of Los Angeles Municipal Code Section 42.15 would bar plaintiffs from selling their expressive works at the Venice Beach Boardwalk without first obtaining non-profit status.

12. The City of Los Angeles and its agents and employees have enforced Los Angeles Municipal Code Section 42.15 to prohibit the sales of plaintiffs' expressive works.

13. Los Angeles Municipal Code Section 42.15 restricts sales only in the beach front areas and does not prohibit distribution of the plaintiffs message in the myriad of other forums available in the City.

14. If plaintiffs wish to bring their message specifically to visitors to the Venice Beach Boardwalk, they are free to distribute leaflets to visitors or give their wares away, or sell their wares through commercial vendors operating off of the beach property, or to open their own shops off of the beach property.

15. The City of Los Angeles has a substantial interest in protecting local merchants from unfair competition and to attract and preserve business, inclusing the shops located close to and along the Venice Beach Boardwalk.

16. The City of Los Angeles has a substantial interest in li miting the number of sellers at the beach in order to

ensure the free flow of traffic along the Boardwalk.

17. Precluding the City of Los Angeles from enforcing Municipal Code Section 42.15 could effect these City interests adversely by causing over crowding on the Boardwalk and increased numbers of illegal vendors competing with taxpaying businesses.

CONCLUSIONS OF LAW

1. The First Amendment to the constitution of the United States applies fully to the goods and wares wh ich the plaintiffs seek to sell. Gaudiya Vaishnava Soc'y v. City and County of San Francisco, 952 F.2d 1059 (9th Cir. 1990), cert.denied, 504 U.S. 914 (1992).

2. Los Angeles Municipal Code section 42.15 does not regulate speech based upon the message or ideas sought to be communicated and is therefor content neutral. Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

3. Los Angeles Municipal Code section 42.15 is a reasonble time, place, and manner regulation of speech. One World One Family Now v. City and County of Honolulu, 96 Daily Journal D.A.R. 1623 (9th Cir. February 13, 1996).

DATED:_____ _____/s/_____
LAUGHLIN E. WATERS
UNITED STATES DIST. JUDGE

Submitted by

_____/s/_____
BYRON R. BOECKMAN
Assistant City Attorney
Attorneys for Defendants,
CITY OF LOS ANGELES, FRANK
MONTELONGO and WILLIE L. WILLIAMS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
MAR 19 1996
Clerk, U.S. District Court
Central District of California
By Deputy

HARRY PERRY and ROBERT "JINGLES" NEWMAN, Plaintiffs, v. LOS ANGELES POLICE DEPARTMENT; CITY OF LOS ANGELES; OFFICER JANE DOE RODRIGUEZ, SERGEANT JOHN DOE MONTELONGO, CAPTAIN WILLYL. WILLIAMS, and DOES and 1-10, inclusive, Defendants.	CASE NO. CV-95-3028 LEW (RMx) ORDER REJECTING PLAINTIFFS' OBJECTIONS TO DEFENDANTS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

This Court entered judgment in favor of defendants on March 11, 1996. The defendants submitted proposed findings of fact and conclusions of law on March 5, 1996, and the plaintiffs submitted objections to these proposed findings of fact and conclusions of law on March 7, 1995[sic]. On March 11, 1996, this co urt adopted the defendants' proposed

findings of act and conclusions of law without amendment. The Court hereby rejects the plaintiffs' objections to these findings of fact and conclusions of law for the following reasons:

1. The plaintiffs submit that the findings of fact Nos. 13 and 15-17 are "entirely speculative" since the defendants did not present any evidence at trial which wo uld support these findings. Find of fact number 13, however, is evident fromt he plain language of the ordinance itself, and no further proff on that issue is necessary.

Findgins of fact Nos. 15 and 16 merely st ate that the City of Los Angeles has a "substantial interest" in protecting merchants from unfair competion and in ensuring the free flow of pedestiran traffic at the Venice Boardwalk. According to One World One Family Now v. City and County of Honolulu. 96 Daily Journal D.A.R. 1623 (9th Cir. February 13, 1996) ("One World"), cities have a substantial interest in "assuring safe and convenient circulation on their streets," and in "protecting local merchants from unfair competition." Testimony from the plaintiffs' witnesses at trial established that numerous artists, political organizations, and other groups have set up along the Venice boardwalk, and these individuals and groups are selling goods or soliciting donations. Thus, these individuals and gro ups, who are threatened by the defendants stepped-up enforcement of L.A.M.C. §42.15, hinder the circulation onthe boardwalk and compete with the "legitimate" businesses which have set up there. According to One World, this is enough to es tablish a "substantial interest" on the part of defendants.

Finding of fact No. 17 merely states that precluding the defendants from enforcing §42.15 could cause an increase in the number of groups and individuals who are selling items along the Venice boardwalk. This fact was inferred by the evidence presented by the plaintiffs that the existing groups and individuals who sell items along the boardwalk, such as

such as the plaintiffs themselves, face extinction if the defendants are allowed to enforce L.A.M.C. §42.15. Therefore, these objections are rejected by the Court.

2. The plaintiffs also claim that finding of fact No. 13 is erroneous because Los Angeles Municipal Code ("L.A.M.C.") §42.15 prohibits sales anywhere in the city, not just sales in the beach front areas. However, the language of L.A.M.C. §42.15 clearly states that it applies only to activities "upon any public beach lands or beach properties adjoining the wat er front of the Pacific Ocean, or upon any boardwalk, sidewalk, or public way immediately a djacent there . . . ." Thus, this objection is incorrect.

The plaintiffs also claim that L.A.M.C. §42.15 "prohibits donations, not just sales, of expressive items." This objection is also incorrect, since the ordinance bans the sale of any goods and the solicitation of donations. The ordinance does not prohibit the donation of expressive items, as the plaintiff claims.

3. The plaintiffs s t ate that the phrase "they are free to" in No. 14 should be changed to "they are legally able to," since the former language is "potentially misleading." The court finds that there is nothing misleading in the original language, as it effectively convenys the meaning that nothing prevents the plaintiffs from taking the actions described in the paragraph.

4. Finally, the plaintiffs argue that the second conslusion of law, which holds that L.A.M.C. §42.15 "does not regulate speech based upon the message or ideas to be communicated and is therefore content neutral," is erroneous. The plaintiffs claim that because L.A.M.C. §42.15 distinguishes between messages off [sic] a "religious, political, philosophical or ideological nature" and all other types of messages, the ordinance is not content neutral.

The plaintiffs' definition of "content neutral" differs from that expressed by the Supreme Court, which notes that

a law is not "content neutral" when it prohibits speech because of disapproval of the ideas expressed." R.A.V. v. City of St. Paul, Minnesota, ___ US, ___; 112 S.Ct. 2538, 2542 (1992) (emphasis added). See also Rosenberger v. Rector & Visitors of University of Virginia, ___ U.S. ___; 115 S. Ct. 2510, 1516 (government cannot regulate speech "based on its substative content or the message it conveys"). An ordinance can single out "religious speech" or "political speech" and still be content neutral as long as the ordinance does not distinguish between any specific ideas or messages being expressed in the speech. Therefore, L.A.M.C. §42.15 is content neutral and the objection to the second conclusion of law is incorrect.

For the reasons stated above, the Court rejects that [sic] the objections put forth by the plaintiffs. The findings of fact and conclusions of law shall stand as originally entered on March 11.

IT IS SO ORDERED.

DATED: 18 March, 1996

/s/

LAUGHLIN E. WATERS
Senior United States District Judge

SEC 42.15. PEDDLING, HAWKING AND SOLICITING ON BEACHES

No person shall hawk, peddle or vend any goods, wares or merchandise, or beg or solicit alms or donations upon any public beach lands or beach properties adjoining the waterfront of the Pacific Ocean, or upon any boardwalk, sidewalk or p ublic way immediately adjacent thereto between the southerly boundary of the City of Santa Monica and the northerly boundary of the City of El Segundo and between the northwesterly boundary of the City of Santa Monica and the northwesterly boundary of the City of Los Angeles.

Nothing in this section contained shall be applicable to or prohibit the sale or offering for sale, or the possession, control or custody of newspapers, magazines, periodicals or other printed matter commonly sold or disposed of by newsdoys or news vendors, nor shall the same be applicable to or prohibit persons engages in the selling or offering for sale or disposing of newspapers, magazines, periodicals or any other such printed matter from crying, call attention to, hawking, advertising or proclaiming the same.

This section shall not apply to the soliciataion of donations by a non-profit organization or the sale of merchandise by a non-profit organization constituting, carrying or making a religious, political, philosophical or ideological message or statement relevant to the purpose of saind non-profit orginaization. **(Added by Ord. No. 167,257, Eff. 9/9/91.)**

AMENDMENTS TO THE UNITED STATES CONSTITUTION

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside. No state shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any state deprive any citizen of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

#27828

Supreme Court, U.S.
FILED
FEB 23 1998
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No. 97-1228

In The

Supreme Court of the United States

October Term, 1997

LOS ANGELES POLICE DEPARTMENT, CITY OF LOS ANGELES, OFFICER JANE DOE RODRIGUEZ, SERGEANT JOHN DOE MONTELONGO and CHIEF WILLIE WILLIAMS,

Petitioners,

vs.

HARRY NMI PERRY and ROBERT "JINGLES" NEWMAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Equal Protection Clause prohibits the City of Los Angeles from requiring membership in a city licensed "charitable" or "non-profit" organization in order for an individual to be allowed to fully exercise one's First Amendment rights under the United States Constitution (hereinafter "First Amendment") in a traditional public forum.

Whether city licensed non-profit organizations have "greater" First Amendment protection than individuals when engaging in protected expressive activities.

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SUMMARY OF ARGUMENT

Respondents Harry Perry and Robert Jingles Newman respectfully request this Court to deny the Petition for Writ of Certiorari seeking review of the opinion of the Ninth Circuit Court of Appeal.

The writ should be denied because (1) there is no conflict of law amongst the appellate courts, or between the Ninth Circuit and this or any other court, or amongst the Ninth Circuit decisions themselves, on the issues presented by this matter; (2) the Ninth Circuit properly states and applies the relevant rules of law; and (3) the petitioners are improperly seeking as, advisory opinion from this Court on how to draft its ordinances, which is not a matter within the jurisdiction of this Court.

STATEMENT OF THE CASE

The issue in this case centers on the constitutionality of an ordinance enacted by the City of Los Angeles which bans the sale of merchandise and the solicitation of donations on public beachfront land, but *exempts* the solicitation of donations and the sale of merchandise "constituting, carrying, or making a religious, political, philosophical or ideological message or statement relevant to the purpose of said non-profit organization" by city licensed non-profit organizations. *Los Angeles Municipal Code* § 42.15 (1991) [Petition, pp. 4-5, 31g]. In striking the ordinance, the Ninth Circuit held that the ordinance was facially unconstitutional and overbroad because there was no basis for allowing the exercise of First Amendment protected rights by licensed non-profit organizations, while prohibiting the exercise of those rights by individuals not belonging to non-profit organizations.

In the period preceding the filing of the action in the district court, individuals engaging in religious, political, and artistic

activities, including Respondents, were ticketed and threatened with arrest and jail if they accepted donations or if they took money in exchange for protected articles bearing such individual's message, if the person could not demonstrate to the City that they belonged to a licensed non-profit organization. Under the ordinance, for example, if an individual wants to test the waters for a run for Congress by going down to the Venice Boardwalk to campaign, he or she will be arrested for violating the City's ordinance if the person raises even a small amount of money by asking for campaign contributions, or for selling CD-ROMs giving his or her life history and detailed proposals, unless they first created a non-profit organization.

After the district court issued its initial Temporary Restraining Order on May 8, 1995, a preliminary injunction was entered on July 3, 1995, which was and has been the basis for successful management of the ocean side of the Venice Boardwalk ever since[1].

In modifying the Temporary Restraining Order to create the terms of the preliminary injunction, the City of Los Angeles was specifically *not* enjoined from "enforcing, Los Angeles Municipal Code Section 42.15 against individuals *or* nonprofit organizations selling *commercial* items such as, but not limited to, foodstuffs, including but not limited to ice cream, hot dogs, churros, pastries, fruit or soda . . . or any other consumer good which does not have a constitutionally protected message

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1. Notably, neither the district court's Memorandum of Decision, entered on July 3, 1995, granting a preliminary injunction on behalf of the plaintiffs, nor the preliminary injunction itself, is mentioned in the City's Petition, nor included in the Appendix thereto. Because it reaches essentially the same conclusions as the opinion rendered by the Ninth Circuit, however, it is not necessary to an understanding of the judgment sought to be reviewed and the decision is therefore not reproduced herein.

inextricably intertwined with the product", to aid the City in distinguishing protected from non-protected activities.

The status quo with respect to allowing non-commercial vendors engaged in expressive activities on the Venice Boardwalk to occupy the western, ocean side of the walkway, while prohibiting commercial vending, was thus successfully preserved all summer long, as it is to this date.

On February 20, 1996, however, after presentation of plaintiffs' evidence at a bench trial in this action, the City of Los Angeles moved for a judgment dismissing the action on partial findings pursuant to Fed. R. Civ. Proc. § 50. The court below granted the request, basing its decision solely on the Ninth Circuit's ruling in *One World One Family Now v. City and County of Honolulu,* 76 F.3d 1009 (9th Cir. 1996), in which an "as applied" challenge to a ban on the sale of message bearing T-Shirts by non-profit organizations on a main city street in Waikiki was rejected.

The Ninth Circuit Court of Appeals reversed, holding that unlike the ordinance in *One World,* the Los Angeles ordinance was not narrowly tailored because it discriminated against a substantial quantity of speech based solely on the identity of the speaker, *i.e.* protected, expressive speech by individuals not affiliated with any non-profit organization, a distinction which was unwarranted to protect the government's interests and to remedy the evil the City was seeking to protect against, rampant commercial activity on the Boardwalk. Thus, the ordinance is overbroad "because it prohibits not only purely commercial activities, but also protected expressive activities, like those of plaintiffs here." *Perry v. Los Angeles Police Department,* 121 F.3d 1365, 1371 (9th Cir. 1997).

REASONS FOR DENYING THE WRIT

I.

THE DECISION BY THE NINTH CIRCUIT PROPERLY STATES AND APPLIES THE APPLICABLE RULES OF LAW SET FORTH BY THIS COURT AND BY PRIOR NINTH CIRCUIT DECISIONS.

A. The Decision Below Is Consistent With This Court's Rulings.

In its Petition for Writ of Certiorari, the City of Los Angeles, *et al.* (hereinafter, "the City") argues that the decision here sought to be reviewed conflicts with the Ninth Circuit's earlier decisions in *One World One Family Now v. City and County of Honolulu*, 76 F.2d 1009 (9th Cir. 1996) and *Gaudiya Vaishnaya Society v. San Francsico*, 900 F.2d 1369 (9th Cir. 1990), *amended*, 952 F.2d 1059 (9th Cir. 1991), and with this Court's decisions in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) and *Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988). Nothing could be further from the truth. In fact, the Ninth Circuit's decision in the instant matter is not only consistent with all of these decisions, as well as with other decisions rendered by this Court, but is supported by them as well.

The "problem" that the City complains of arises not from any conflict of law, but from the City's misunderstanding of the law, as evidenced by the following "conclusion" set forth by the City: "Thus, speech by non-profit organizations is *differentiated* and given *higher constitutional freedom of speech treatment* than other types of speech." [Petition, p. 14 (emphasis added)]. This statement, which summarizes the City's entire

argument, is fallacious, and the Equal Protection Clause mandates that the discrimination between the exercise of First Amendment rights by non-profit organizations and individuals is patently unconstitutional. As correctly observed by the Ninth Circuit:

> This type of speaker-based discrimination is unacceptable. In *Schaumberg*, the [Supreme] Court found that the solicitation of charitable donations could not be regulated by a distinction based on *who* was doing the soliciting. The [Supreme] Court has also noted that "government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2516 (1995). The government's argument that prohibition of expressive speech can turn on a person's membership in a non-profit organization fails.
>
> * * *
>
> There is simply no authority limiting the right to seek charitable donations or to sell expressive items to those with memberships in non-profit organizations. No other First Amendment rights are restricted in such a manner. Once it is decided that the activity here is expressive activity, fully protected by the First Amendment, the fact that plaintiffs are not nonprofit organizations does not affect the level of protection accorded to their speech.

Perry v. Los Angeles Police Department, 121 F.3d 1365, 1371 (9th Cir. 1997) [Petition, p. 15a]; *see also, Carey v. Brown*, 447 U.S. 455, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980) (ordinance discriminating amongst types of picketers not

narrowly tailored); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993) (ordinance discriminating between newsracks for newspapers and newsracks for commercial handbills not narrowly tailored); *Village of Shaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980) (ordinance discriminating between charitable organizations based on the amount of their receipts used for charitable purposes not narrowly tailored to serve governmental interest in limiting total number of door to door solicitations).

The City's sole support for its conclusion that it may discriminate in favor of non-profit organizations, offered without explanation, is this Court's decisions in *Board of Trustees of the State Univ. of New York v. Fox, supra,* and *Riley v. National Federation of the Blind, supra.* [Petition, p. 16]. However, neither of those decisions supports the idea that protected speech by non-profits may be differentiated from and offered greater protection than protected speech by individuals without running afoul of the Equal Protection Clause.

In *Riley,* in response to a challenge by a "coalition of professional fund-raisers, charitable organizations, and potential charitable donors", *Fox, supra,* 487 U.S. at 787, this Court held that various provisions contained in North Carolina's Charitable Solicitations Act licensing fund-raisers were unconstitutional and not narrowly tailored to the state's interest in preventing fraud.

In so holding, the Court ruled that contrary to the state's position that it had an overriding governmental interest in regulating the charitable solicitations of non-profit organizations, charitable fund-raising constituted *equally* protected First Amendment speech. In ruling that non-profit charitable solicitations may not be more burdened than other types of

protected speech, and is thus equally protected speech, this Court certainly did not suggest that such speech by non-profits was *more* protected than any other type of speech. *Id.*

In *Fox*, unlike in *Riley*, the issue before the Court was the prohibition by the State University of New York (SUNY) of the operation of private *commercial* enterprises in SUNY facilities. Because the factual situation was vastly different than in the instant case, the *Fox* decision is only tangentially related to the instant action. In *Fox*, a group of students alleged that in prohibiting "tupperware parties" in their dormitories, SUNY was infringing upon their First Amendment rights.

In ruling that the housewares parties sought to be held by the students constituted unprotected commercial speech, the Court discussed its holding in *Riley* concluding that fund-raising by charitable organizations is fully protected speech because the commercial aspects of the speech are inextricably intertwined with the non-commercial aspects of the speech. With respect to the housewares parties, that Court stated, "there is nothing 'inextricable' about the noncommercial aspects of these presentations." *Board of Trustees v. Fox*, 492 U.S. at 474.

The Court went on to discuss the allowable scope of government restrictions upon this commercial speech, discussions which have no relevance to the instant action, in which it is undisputed that all of the speech at issue is protected First Amendment activity. Once again, there is simply nothing in *Fox* to support the City's contention that speech by non-profit organizations is to be afforded any greater protection than any other non-commercial speech, regardless of the speaker.

B. The Decision Below Does Not Conflict With The Ninth Circuit's Earlier Holdings In *Gaudiya* And *One World One Family Now.*

The decision below is not only consistent with the Ninth Circuit's own decisions, but it is also entirely supported by the earlier decisions rather than contradicted by them.

In *Gaudiya,* for example, the Ninth Circuit recognized that the sale of merchandise by the plaintiff non-profit organizations constituted protected First Amendment activity, even though the merchandise being sold existed in the gray area between purely commercial speech and speech having no intrinsic purpose or value other than to communicate a message, because the merchandise and the message were inextricably intertwined. *Gaudiya Vaishnava Society v. San Francisco,* 952 F.2d 1059 (9th Cir. 1991). As pointed out by the Ninth Circuit in the instant decision, none of the reasoning in *Gaudiya* even revolved around the incidental fact that the plaintiffs were non-profit organizations rather than individuals. *Id.; see also Perry v. Los Angeles Police Department,* 121 F.3d at 1370 [Petition, p. 15a].

While it is true that in reaching its decision in *Gaudiya* the Ninth Circuit *necessarily* "relied on case law that accords First Amendment protection to fund-raising for charitable organizations", [Petition, p. 13], that decision simply does *not* say that non-profit organizations are to receive *greater* constitutional protection than others engaging in the same types of expressive activities. To the contrary, in fact, the need for the court to establish the basis for the First Amendment protection of the non-profits' activities *at all* suggests that there was some issue as to whether or not that type of speech was even protected, not that it was to receive *greater* protection. Thus, the *Gaudiya* decision is in no manner inconsistent with the instant decision.

In *One World One Family Now,* non-profit T-Shirt vendors who were attempting to sell articles of clothing bearing slogans and messages on a busy city street in the heart of Waikiki raised a very narrow "as applied" challenge to an ordinance which banned the sale of any types of merchandise except newspapers, but did allow handing out literature, proselytizing, or soliciting donations, amongst other things. *One World One Family Now v. City and County, of Honolulu,* 76 F.3d 1009, 1014 (9th Cir. 1996). The Ninth Circuit upheld the Honolulu ordinance in a 2-1 decision, holding that it was content-neutral and narrowly tailored as applied to those particular plaintiffs.

In so holding, the Ninth Circuit found that while the message bearing T-Shirts were undoubtedly First Amendment protected items[2], the Honolulu ordinance was valid because in instituting a flat ban on all sales, it did not require any exercise of discretion by government officials, was inherently content-neutral, and was narrowly tailored since it banned both

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2. Plaintiffs point out that T-Shirts themselves fall into a special category of expressive item in which the monetary value of the printed material is primarily in the medium (the article of clothing), and only incidentally in the message, unlike other items in which the article itself without the message has very little intrinsic value. An interpretation of the First Amendment saying that anything could be sold in a public forum as long as it had a message printed on it would undoubtedly result in the sale in public parks of "Save the Whales" refrigerators or "Newt Gingrich for President" bicycles. Respondents respectfully suggest that for items where the message is being conveyed on a medium that costs vastly more than its intrinsic value only because of the message being conveyed should be treated differently than items the value of which lies only incidentally in the message. Thus, such items as newspapers, bumper stickers, buttons, books and CD-ROMs, for example, have virtually no value without the speech contained in them, and are clearly purchased for the message they contain and not for the underlying medium.

commercial and non-commercial sales alike, and left open ample alternative channels of communication because it foreclosed one narrow form of expression — sidewalk sales of message bearing merchandise — but left the plaintiffs free to disseminate and seek support for their views by handing out literature, proselytizing or soliciting donations, for example. *One World One Family Now*, 79 F.3d at 1014.

Unlike the Honolulu ordinance, the Los Angeles ordinance is not a narrowly tailored ban, because it bans both the solicitations of donations and the sales of First Amendment protected materials by individuals, but not by registered non-profit organizations, and therefore discriminates against categories of speakers. It furthermore *does* vest discretion in government officials, because they can require, grant or deny non-profit licenses as a prior restraint on speech by individuals.

The Ninth Circuit states the distinction between the cases succinctly:

> [I]n *One World*, the restriction did not discriminate against certain types of speech depending on the speaker. In fact, in *One World*, when the court analyzed whether the ordinance was narrowly tailored, it reasoned that the ordinance was narrowly tailored because it addressed the government interests "without . . . significantly restricting a substantial quantity of speech that does not create the same evils." 76 F.3d at 1014 (citing *Ward*, 491 U.S. at 799 n.7). Here, defendants claim to be prohibiting the evil of commercial activity by prohibiting all soliciting of donations and sales by anyone not affiliated with a nonprofit. However, the nonprofit distinction significantly restricts a substantial quantity of speech — namely expressive speech by

> people who are not nonprofit members — that does not create the same evils as purely commercial activity on the boardwalk — which is what the government admittedly wants to restrict. Thus, applying the reasoning of *One World*, rather than merely looking to its result, one can see that the ordinance at issue here is not narrowly tailored to serve government interests.

Perry v. Los Angeles Police Department, 121 F.3d at 1371 [Petition, pp. 15a-16a].

Governmental authorities have often attempted to require potential solicitors to register with civic or law enforcement authorities before beginning their campaigns. Where registration processes appeared to be actually *licensing* programs giving undue discretion to the licensing officer(s), however, such registration processes have generally been declared unconstitutional. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988); *Shuttlesworth v. City of Birmingham*, 194 U.S. 147, 149, 150-151, 89 S. Ct. 935, 938-39, 22 L. Ed. 2d 162 (1969).

In essence, the ordinance struck down by the Ninth Circuit as overbroad impermissibly sought to license any and all First Amendment activity by requiring that the individual activist either "shut up" or become a member of a non-profit organization licensed by the City itself. This is necessary, the City argued, in order for it to be able to distinguish between "commercial" and "non-commercial" activities.

The City also argued to the Ninth Circuit that the non-profit license was so easy to obtain that even plaintiffs could do

it, but, as noted by the court, this argument contradicts the City's position that the licensing, and hence the distinction between non-profit organizations and individuals, is necessary to protect the governments' alleged interest in protecting against rampant commercial activities if absolutely anyone can obtain it.[3]. *Perry v. L.A.P.D.*, 121 P.3d at 1370, n.1. "A lack of non-profit status cannot reasonably be a predictor of purely commercial activity." *Id.*

Thus, the Ninth Circuit has properly stated and applied the relevant rules of law set forth by this Court, in a manner consistent with this Court's and the Ninth Circuit's other decisions in this area, and there is no reason for review on those grounds.

II.

AN ADVISORY OPINION TO THE CITY OF LOS ANGELES ON HOW TO DRAFT ITS ORDINANCES IS UNNECESSARY AND IMPROPER.

Finally, the City seeks to know "what law, if any . . . a city may establish in order to comply with constitutional freedom of speech requirements . . ." [Petition, p. 8], and "exactly what may and may not be banned and what must be allowed". [Petition, p. i]. This is a request for an advisory opinion. The actual case or controversy comprising the instant action is the constitutionality of the City's ordinance as it currently exists, not the constitutionality of all of the theoretical possibilities the City could or could not allow in its future anti-vending ordinances.

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3. Actually, the ordinance is vague as to what is required to be deemed a "non-profit organization", since an entity can be considered non-profit for federal tax purposes without being licensed by the City of Los Angeles, for example.

" 'The existence of judicial power under Art. III of the Constitution depends on the existence of a case or controversy,' and 'a federal court lacks the power to render advisory opinions.' (citations omitted)" *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446, 113 S. Ct. 2173, 2178, 124 L. Ed. 2d 402 (1993). Thus, the prohibition against advisory opinions is based in the Constitution, and this Court has always been loathe to render such advisory opinions, especially where, as here, to do so would blur the lines between the executive, legislative and judicial branches. *See Clinton v. Jones*, 117 S. Ct. 1636, 131 L. Ed. 2d 945 (1997) ("These restrictions on judicial activities 'help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for other branches.' (citations omitted)"); *See also Hudson v. United States*, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). As this Court has stated:

> "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies." (citations omitted)

Raines v. Byrd, 117 S. Ct. 2312, 138 L. Ed. 2d 849 1997 U.S. LEXIS 4040 *14 (1997).

Furthermore, to ask this Court to iterate "what law, if any . . . a City may establish in order to comply with constitutional freedom of speech requirements . . ." [Petition, p. 8] and "exactly what may and may not be banned and what must be allowed" [Petition, p. i] is to improperly ask this Court to decide additional constitutional questions not absolutely necessary to the decision in this case: "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283,

295, 49 L. Ed. 482, 25 S. Ct. 243 (1905), *quoted in Hudson v. United States,* 118 S. Ct. 488, 139 L. Ed. 2d 450, 1997 U.S. LEXIS 7497 *34 (1997).

This Court is not a legislature, and is not in the position to unnecessarily advise the City in how to draft its ordinances to comply with established laws. What the City seeks in its request for review by this Court is an encyclopedic explanation of what it can and cannot allow in a public forum, *i.e.* an "owner's manual" or "laundry list" for drafting anti-peddling ordinances. The City's fundamental misconceptions about even the most basic First Amendment principles is evident throughout its petition, and drafting laws which withstand constitutional muster is surely never an easy task; however, the City's ignorance or inability to comprehend fundamental First Amendment principles is hardly cause for review on certiorari of a properly reasoned appellate court decision.

Indeed, instead of looking to this Could for advice on how to draft its ordinance, perhaps the City should look to the language of the preliminary injunction entered by the district court, which has been the basis for successful management of the Venice Boardwalk for nearly three years now. Incidentally, it should be noted that contrary to the City's representation in their Petition that without this Court's advisory opinion they will be forced to "go back to a total ban of sales and solicitations on the Boardwalk", [Petition, p. 15] such a "total ban" was *never* enforced against First Amendment activists, performers, artists, *etc.* on the Venice Boardwalk, but rather was only ever enforced against purely commercial activities such as the sale of soft drinks or shoes. After the current ordinance was enacted, however, even purely commercial activities such as the selling of hot dogs and Snapple brand drinks was allowed by the City, as long as it was being done by a non-profit organization.

The City of Los Angeles has simply failed to recognize, and continues to fail to recognize, that the distinction lies not in whether or not the "sale of wares" is "charitable", *id.*, but in whether the item being sold or given away is a protected, expressive item whose value is in the message, regardless of *who* is engaging in the protected speech.

> It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. . . . Freedom of speech, freedom of the press, freedom of religion *are available to all*, not merely to those who can pay their own way.

Murdock v. Pennsylvania, 319 U.S. 105, 111, 63 S. Ct. 870, 87 L. Ed. 1292 (1943) (Emphasis added). And, it should be noted, not merely to those who belong to non-profit organizations.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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